Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

COUNTY OF HAWAII,

Petitioner,

vs.

ERNEST AARON ANDERSON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where Petitioner's deputy prosecuting attorney, herself a non-policy making official, arguably targeted Respondent for prosecution based upon Respondent's vocal advocacy of legalization of marijuana and similarly, can Petitioner municipality incur civil rights liability to Respondent in that its elected prosecutor, a "single-instance" policy maker, knew of the alleged wrongdoing when Respondent filed this action in the United States District Court but did not direct the offending deputy to dismiss the pending state indictment based upon such allegation?

2. Can Petitioner municipality's "single-instance" policymaker, i.e., its elected prosecuting attorney, be found to have ratified and approved an invidious prosecution by one of his deputies based upon post-event complaint thereof coming to his attention and absent complaint or evidence of more than a single alleged incident of wrongdoing?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, County of Hawaii, respectfully prays that a writ of certiorari issue to review the June 1, 1999, opinion of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit dated June 1, 1999, is reported at 176 F.3d 1231, and is reprinted in the Petition Appendix ("App.") beginning at App. 1. The unreported opinion of the United States District Court for the District of Hawaii, dated April 16, 1998, is reprinted commencing at App. 22, and its Order dated July 23, 1998, denying Respondent's Motion for Reconsideration is reprinted commencing at App. 47.

STATEMENT OF JURISDICTION

Petitioner seeks review of the Ninth Circuit Court of Appeals' Opinion dated June 1, 1999.

The United States Supreme Court has jurisdiction to review cases from the Circuit Court of Appeals by virtue of 28 U.S.C. § 1254.

STATEMENT

This case presents starkly a vexing mutation of "single-instance" policymaking erected by *Monell's*[1] progeny, i.e., *Pembaur, Praprotnik* and *Jett*[2].

The remarkable off-shoot found in *Pembaur, Praprotnik* and *Jett* has never been expressly and resolutely adopted by a majority of this court. It has been solely the work of pluralities.

Its mischief is well-illustrated in the instant case which approaches the nadir of erosion of the *Monell* principle based upon radical distortion of the "single-instance" paradigm.

To the point, the Respondent was charged via indictment with feloniously promoting a detrimental drug, i.e., marijuana. The indictment was brought by Petitioner's deputy prosecutor Iopa following pre-indictment screening and review by her superior Ashida.

Subsequently, Respondent and his co-defendant in the state criminal case Christie (as to whom the indictment was long-ago voluntarily dismissed) filed this action in the United States District Court midway through the course of the state proceedings. The federal action was brought pursuant to 42 U.S.C. § 1983 and

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[1] *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 58 L.Ed.2d 611 (1978).

[2] *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed. 2d 107 (1988); *Jett v. Dallas Ind. School Dist.*, 491 U.S. 701 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989).

premised upon the notion of invidiously selective prosecution, i.e., that it was motivated by Respondent's and Christie's vocal advocacy of legalization of marijuana, their letters to the editor consonant therewith and the like.

Indeed, reputed recitations by the County Prosecutor's deputy handling the case lend themselves to an inference that Respondent's and Christie's advocacy did, in greater or lesser measure, motivate her actions.

Despite filing of this federal civil rights action and service of the complaint herein on the County's prosecutor, Kimura, the state court prosecution proceeded to trial. After a hung jury, the state court dismissed the indictment.

The United States District Court correctly found the County's Prosecutor Kimura and deputy prosecutor Iopa entitled to absolute immunity under 42 U.S.C. 1983 relying upon *Imbler v. Pachtman*[3], and its progeny.

It denied the County's dispositive motion which asserted, inter alia, Eleventh Amendment immunity based upon Hawaii law which expressly recites that Hawaii's County prosecutors "act under the authority of [Hawaii's] attorney general." The Ninth Circuit upheld this denial in an unreported decision and remanded the case to the District Court.

Petitioner County succeeded in its second attempt before the District court to secure summary judgment in

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[3] *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976).

its favor, the Court finding that deputy prosecutor Iopa was not a *Pembaur-Praprotnik-Jett* "single-instance" policymaker but that elected County prosecutor Kimura was such.

Nevertheless, the district court concluded that Kimura did not approve or ratify Iopa's behavior which it characterized as "aberrant" and unforeseeable.

Respondent appealed to the Ninth Circuit, which largely agreed with the reasoning and results of the district court's judgment with one exception.

Extending a premise articulated in a tiny handful of reported cases, the court reversed the district court solely as to Respondent Anderson. It reasoned that once this action was filed in the United States district court wherein Respondent and Christie complained of the allegedly invidious motives of Iopa and the basis of such allegations, then somehow Kimura's knowledge of the allegations in the complaint required rectification by him of the alleged wrongdoing.

REASONS FOR GRANTING THE WRIT

1. **The Lower Court's Quantum Leap in Concluding that Petitioner's Elected Prosecuting Attorney's Knowledge of Respondent's Complaint Via a Civil Rights Action of Wrongful Selective Prosecution By A Deputy Prosecutor and the Prosecutor's Failure to Act to End the Prosecution Somehow Equates to Deliberate Indifference to or Ratification of the Wrongful Act.**

2. **The Lower Court's Conclusion That Post-Event Knowledge by Petitioner's Elected Prosecutor of A Complaint By Respondent of Invidious or Selective Prosecution by One of the Prosecutor's Deputies and Failure to Dismiss the State Court Indictment or Otherwise Halt the Prosecution Somehow Ratifies the Allegedly Antecedent Wrongdoing Creates De Facto Respondeat Superior Liability Contrary to *Monell*.**

This Petition results from the quantum extension of "single-instance" policymaker liability foisted upon Petitioner municipality in the instant case.

Moreover, the notions of attribution, approval and ratification applied by the Ninth Circuit have never been expressly countenanced by this court in its struggle to elucidate the boundary between *Monell* doctrinal restraint and the linear tug of respondeat superior liability.

In determining that the County may be responsible for its non-policymaker's random wrong, the Ninth Circuit looked to a handful of reported decisions which, in disparate factual contexts, have held that post-event complaints of multiple civil rights wrongs, if not acted upon by a municipal policy maker, can be construed as ratifying the wrong, thus triggering municipal liability.

Such resolution, particularly where, as here, involving a single instance of reputed invidious wrong and unlike other post-event evidence cases involving multiple and continuing wrong, cannot be viewed as other than subversive of the *Monell* bar to municipal liability for isolated civil rights violations by non-policy making municipal employees.

So far as Petitioner can discern, the United States Supreme Court has never considered the application of post-event knowledge of a subordinate's wrongdoing by a policymaker and his burden to act to avoid attribution/ratification and consequent *Monell* liability on the part of the municipality.

I. Arguably, Single-Instance Policy Jurisprudence Engendered By the Fractious Opinions In Pembaur, Praprotnik and Jett Is Ill-Advised and Should Be Reconsidered; In Any Event the Extension Thereof In the Instant Case Is Wrong.

One might be sympathetic in some measure to the befuddlement found in the Ninth Circuit's opinion herein.

It is bad enough that the lower federal courts are compelled to spin the finest of gossamer threads to discern who is a single-instance municipal policy-maker.

Even more vexing is the application of the appendage grown by some lower federal courts and labeled as ratification after-the-fact by a "single-instance" *Pembaur-Praprotnik-Jett* policymaker which then gives rise to municipal liability.

It is true that in *Praprotnik*, the plurality remarked "[i]f the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final." 485 U.S. at 127, 108 S.Ct. at 926.

The difficulty in the instant case arises in large part based upon the Ninth Circuit's less than rigorous application of the tripartite requisites of approval, ratification and basis for the decision.

In a nutshell, what the Ninth Circuit deigned to do was to say in effect: "Well, the jury can infer approval/ratification/basis based upon Kimura's perceived inaction" in the face of the allegations of the single-instance federal complaint.

The instant case does not fit either of the two illustrations in *Praprotnik* where a policymaking municipal officer could fairly be said to have adopted a policy formulated by a subordinate officer or employee.

First, such a conclusion is permissible if the subordinate's decision was "cast in the form of a policy statement and expressly approved by the supervising policymaker." 485 U.S. at 130, 108 S.Ct. at 927-928. That did not occur in the case at bar.

Second, if a "series of decisions by a subordinate official manifested a 'custom or usage' of which the supervisor must have been aware," then a municipal policy can be inferred. Id. In the instant case, only one allegedly wrongful prosecution is involved, not a series.

The starkly posed premise Petitioner argues here is succinctly articulated by several courts in the following ways:

It does not suffice to assert that Petitioner's elected prosecutor should have somehow "stopped the alleged improper conduct; § 1983 requires more, an affirmative ratification." *Keenan v. Allan*, 889 F.Supp. 1320, 1363 (E.D.Wash. 1995).

Otherwise stated, "failure by policymaking officials to take corrective action is insufficient in and of itself to show § 1983 liability." *Baskin v. City of Des Plaines*, 138 F.3d 701, 705 (7th Cir. 1998).

And, similarly, *Wilson v. City of Chicago*, 6 F.3d 1233, 1240 (7th Cir. 1993) (failure to eliminate practice cannot be concluded as approving it).

See also Triplett v. District of Columbia, supra, 108 F.3d 1450, 1454 (D.C.Cir. 1997), articulating how *Praprotnik* and *Jett* have pared down the notion of subordinates' single-instance policy power when they "apply discretionary policy" as distinguished from "authority to make policy" and *Jett's* narrow possibility of liability where final policymakers "acquiesce in a longstanding practice or custom which constitutes the 'standard operating procedure' of the local governmental entity."

In order to posit liability based upon the notion that Kimura ratified Iopa's conduct, plaintiffs "must . . . present evidence that [Kimura] not only accepted [her conduct], but knew of and ratified [her actions]." *Gattis v. Brice*, 136 F.3d 724, 727 (11th Cir. 1998).

Moreover, reported cases indicate that policymakers' failures to investigate complaints of subordinates' unconstitutional actions must involve repeated complaints. *See, e.g. Ferreira v. Westchester County,* 917 F.Supp. 209, 215 (S.D.N.Y. 1996) ("evidence that a municipality repeatedly failed to meaningfully investigate complaints could create . . . an inference of wrongful policy"); *Fahle v. Braslow,* 913 F.Supp. 145, 151 (E.D.N.Y. 1996) ("repeated complaints of civil rights violations" and no meaningful attempts to investigate or forestall further incidents).

Indeed, although it may be that " 'evidence that a municipality repeatedly failed to meaningfully investigate complaints' could raise [an] inference of custom, practice or policy, [t]he mere fact of other lawsuits against the city does not provide a basis for liability." *Singleton v. City of Newburgh,* 1 F.Supp.2d 306, 311 (S.D.N.Y. 1998).

"The complaints do no more than suggest that the city was on notice of various civil rights abuses that had been alleged." Id. at 312-313.

Similarly, *Mendoza v. City of Rome,* 872 F.Supp. 1110, 1119 (N.D.N.Y. 1994) ("fact that . . . claims were filed does not constitute evidence of violation of constitutional rights.")

In sum, the fact that Prosecutor Kimura did not immediately drop everything else he was doing to investigate the circumstances motivating Respondent Anderson's civil rights lawsuit is governed by the same rationale. No reported case anywhere indicates that a lawsuit complaining of one instance of abuse by a non-policy making municipal employee, despite a desultory

or lackadaisical absence of investigation, can give rise to an inference of a municipal policy.

Wilson v. City of Chicago, 6 F.3d 1233 (7th Cir. 1993), illustrates how more than mere negligence is required on the part of municipal policymakers. There, the plaintiff arguably proved a negligently administered system of citizen complaint review. Plaintiff alleged his confession was coerced by torture and that Chicago policymakers tolerated such torture. Evidence revealed numerous complaints that police abused suspects accused of injuring or murdering police officers in a specific geographic area. The Seventh Circuit affirmed summary judgment in favor of Chicago despite strong evidence that widespread abuse took place against these suspects. Regarding the evidence, the court commented:

"A rational jury could have inferred from the frequency of the abuse, the number of officers involved in the torture of *Wilson*, and the number of complaints from the black community, that [Superintendent of Police] Brzeczek knew that officers . . . were prone to beat up suspected cop killers. Even so, if he took steps to eliminate the practice, the fact that the steps were not effective would not establish that he had acquiesced in it and by doing so adopted it as a policy of the city." 6 F.3d at 1240.

In the instant case, not only is there no evidence of frequency of abuse, there is not even evidence that this was not an isolated, aberrant, never-before-encountered event. How, then, can it be said that Kimura's perceived inaction constituted a municipal policy?

II. Assuming That Instantiation Has Supplied Coherency to the Oxymoronic Phrase "Deliberate Indifference," It Was Misapplied by the Ninth Circuit In the Instant Context.

The Ninth Circuit's cavalier application of the wonderfully oxymoronic phrase "deliberate indifference"[4] to the instant factual scenario is greatly off the mark.

No case anywhere, even in the Ninth Circuit itself, has ever found directly or by inference a jury issue of willful indifference in a comparable context where a single instance complaint is made and known to have been made to a *Pembaur-Praprotnik-Jett* policy-maker, absent additional factors not present in the instant case.

Specifically, *Henry v. County of Shasta*, 132 F.3d 512 (9th Cir. 1997), so heavily relied upon by the Ninth Circuit in the instant case involved complaints of multiple

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[4] "[D]eliberate indifference – an apparent oxymoron – is an awkward and slippery reference to the mental element needed to establish a breach of . . . constitutional duty. . . . Cohen, *"Captives Legal Right to Mental Health Care,"* 17 Law & Psychol. Rev. 1, 17 (1993); Gray, *"Wilson v. Seiter:* Defining the Components of and Proposing A Direction for Eighth Amendment Prison Condition Law," 41 Am.U.L.Rev. 1339, 1389 n. 155 (1992) (citing cases articulating Courts' difficulty with the phrase); "If you think about it, it is questionable whether, literally, a person can be deliberate and indifferent at the same time." Schwartz, *"Section 1983 Litigation"* (Symposium, The Supreme Court and Local Government Law 1993-94 Term), 11 Touro L.Rev. 299, 315 (1995); "It might appear that the term 'deliberate indifference' is an oxymoron in that 'indifference' suggests negligence rather than an intentional wrong." McCarthy, *"Students As Victims of Sexual Harassment: The Evolving Law,"* 27 J.L. & Educ. 401, 421, n. 80 (1998).

incidents over a lengthy period of time. Conversely, in the instant case, one instance is at issue.

In *Fuller v. City of Oakland,* 47 F.3d 1522 (9th Cir. 1995), the policymaker, i.e., the Chief of Police, unlike the instant case, actually reviewed the case file and affirmatively approved the unconstitutional action, and in *Larez v. City of Los Angeles,* 946 F.2d 630, 646 (9th Cir. 1991), the failure to terminate wrong rationale was not utilized to find municipal liability, but solely to support supervisory liability on the part of the city's chief of police.

The Ninth Circuit's invocation of the phrase "post-event evidence" is virtually nonexistent in other reported *Monell* policy cases. Other than its own decision in *Henry v. County of Shasta,* 132 F.3d 512 (9th Cir. 1997), only two other reported federal decisions have utilized the phrase in considering *Monell* issues, i.e., *Bordanaro v. McLeod,* 871 F.2d 1151, 1166-67 (1st Cir. 1989), and *Brown v. City of Elba,* 754 F.Supp. 1551, 1558 n.21 (M.D.Ala. 1990).

Significantly in both *Bordanaro* and *McLeod,* a series of continued wrongs and not one instance, as in the case at bar, existed.

Indeed, in *Bordanaro,* "[t]he Chief of Police had constructive knowledge of [a] custom. . . . " 871 F.2d at 1158, and the trial court's jury instruction had stated that post-event evidence is admissible in that " . . . there may be a continuity in municipal policy so that what happens after the event may cast some light on what the policy was prior to the event. Now that's the only purpose for which I am admitting this post July '82 evidence." 871 F.2d at 1167, n. 11. Suffice to say, there is no evidence of repeated or continuity of wrong in the present case.

Moreover, "deliberate indifference" means different things in disparate contexts, even in this Court. For example, in *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994), the Court stated that the meaning of deliberate indifference for Eighth Amendment purposes is not controlled by its usage in *City of Canton v. Harris*,[5] where it defined the standard of culpability in failure to train cases. The Ninth Circuit does not enlighten one as to whether it looked to *Harris*, *Farmer* or otherwise in its use of the phrase.

"Because 'deliberate indifference' is a judicial gloss, appearing neither in the constitution nor in a statute, we could not accept [the] argument that the test for 'deliberate indifference' described in *Canton*. . . . , must necessarily govern here." *Farmer v. Brennan*, 511 U.S. 825, 838 114 S.Ct. 1970, 1980, 128 L.Ed.2d 811 (1994).

One may justifiably ask if constructive notice has any more place in the instant case (Kimura should have known based upon the allegations in the civil rights complaint) than in the prison – Eighth Amendment context: "[W]e cannot accept petitioner's argument that *Canton* compels the conclusion that a prison official who was unaware of a substantial risk to an inmate may nevertheless be held liable. . . . if the risk was obvious and a reasonable prison official would have noticed it." 511 U.S. at 842, 114 S.Ct. at 1981.

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[5] *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989).

CONCLUSION

Great disquietude, muttering and head-shaking attend the *Monell* rule. Many are the voices which decry its inequity and lack of linearity. After all, respondeat superior liability is the norm for all (or virtually all) other torts. Nevertheless, it remains the law and insidious judicial erosion of the *Monell* fortress should be recognized and admonished.

The inescapable conclusion is that the court below extended the ratification prong of *Monell*-founded liability to a hitherto unreached extreme.

That being so, the Ninth Circuit was mistaken.

More importantly, this case, in large measure, reflects the difficulty stemming from the lacunae of the plurality opinions of this court involving single-instance policy jurisprudence in § 1983 litigation.

As such, it offers a remarkable opportunity to bring order out of chaos and should, therefore, be accepted for plenary review.

Dated: Hilo, Hawaii, July 13, 1999

Respectfully submitted,

STEVEN CHRISTENSEN
Deputy Corporation Counsel
County of Hawaii

APPENDIX

Roger CHRISTIE and Ernest Aaron Anderson, Plaintiffs-Appellants,

v.

G. Kay IOPA, in her personal capacity; Jay Kimura, in his personal capacity; the County of Hawai'i; and Does 1-10, Defendants-Appellees.

No. 98-16547.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 27, 1999.

Filed June 1, 1999.

Steven D. Strauss, Hilo, Hawaii, for the plaintiffs-appellants.

Joseph Kamelamela and Steven Christensen, Deputy Corporation Counsel, County of Hawaii, Hilo, Hawaii, for the defendants-appellees.

Appeal from the United States District Court for the District of Hawaii David Alan Ezra, District Judge, Presiding. D.C. No. CV-95-01026-DAE.

Before: Jerome Farris, John T. Noonan, and Susan P. Graber, Circuit Judges.

GRABER, Circuit Judge:

In this action brought under 42 U.S.C. § 1983, Plaintiffs allege that a deputy prosecutor for the County of Hawaii violated their constitutional rights. The district court granted the County's motion for summary judgment, holding that the County is not legally responsible for the deputy prosecutor's acts. For the reasons that

follow, we affirm as to plaintiff Christie, but reverse as to plaintiff Anderson.

FACTUAL AND PROCEDURAL BACKGROUND

Because the district court granted summary judgment, we view the evidence in the light most favorable to the nonmoving party. *See Jesinger v. Nevada Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir.1994).

Plaintiffs advocate the legalization of marijuana, and they are well known for that advocacy. They also have worked to expand the commercial use of hemp, including its use as food and clothing. Commercial sterilized hemp seeds are readily available at stores in Hawaii, such as Walmart; often, these seeds are mixed with other types of seed and sold as bird seed. In April 1991, Anderson ordered 25 pounds of sterilized commercial hemp seeds on behalf of Plaintiffs. The police seized Plaintiffs' order and charged them with Promotion of a Detrimental Drug in the Second Degree, a felony. Before Plaintiffs' arrest, no one in the County of Hawaii ever had been prosecuted for possession of commercial sterilized hemp seeds.

On January 9, 1992, deputy prosecutor Iopa sought a grand jury indictment against Plaintiffs, at least in part because of their advocacy for the legalization of marijuana:

> As a practical matter, no, we're not going to go out, bust the little old lady that's got a bag of bird seeds just because there is one marijuana seed in there. Um, when you get twenty-five pounds within an order for five hundred pounds or more, going to, um, a hemp grower,

> that is very vocally, very outwardly advocating the legalization of marijuana.

(Emphasis added.) To obtain the indictment, Iopa presented false evidence that Plaintiffs' hemp seeds had germinated when tested.

After obtaining the indictment, Iopa offered to enter into a plea agreement with Plaintiffs. However, Iopa refused to negotiate unless Plaintiffs agreed not to write any more letters to the newspaper about the case.

On October 30, 1995, the Hawaii court dismissed criminal charges against Christie without prejudice and, on March 4, 1998, the court dismissed the indictment against Anderson after a jury's deadlock had caused a mistrial.

After Christie's case had been dismissed, on December 15, 1995, Plaintiffs filed the present complaint alleging that Iopa, Hawaii Prosecutor Kimura, and the County had violated their rights to speak freely, to petition the government, and to be free from government oppression.[1] Plaintiffs included similar state-law claims. The County moved for judgment on the pleadings, arguing in part that it enjoys Eleventh Amendment immunity. The district court disagreed, but sua sponte granted judgment on the pleadings to Iopa and Kimura. The County appealed the Eleventh Amendment ruling to this court, which affirmed in an unpublished disposition. *See Christie v. Iopa*, 121 F.3d 714 (9th Cir.1997) (unpublished table decision).

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[1] Plaintiffs later amended their complaint to also allege that Defendants interfered with their right to engage in commerce.

On remand, the County twice moved for summary judgment, arguing that it was not legally responsible for Iopa's alleged violations of Plaintiffs' constitutional rights. The court denied the first motion, but granted the second. Plaintiffs then moved for reconsideration, which the district court denied. Thereafter, the district court declined to exercise supplemental jurisdiction over Plaintiffs' state-law claims and, therefore, dismissed the case. This timely appeal ensued.

STANDARD OF REVIEW

We review de novo a district court's grant of summary judgment to determine "whether the district court correctly applied the law and if, viewing the evidence in the light most favorable to the non-moving party, there are no genuine issues of material fact." *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir.1998).

DISCUSSION

Title 42 U.S.C. § 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

(Emphasis added.) Congress intended the term "person" to include municipalities, such as the County here. *See Monell v. Department of Social Serv. of N.Y.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Nevertheless, Congress did not intend to create respondeat superior liability. *See id.* at 691 ("[A] municipality cannot be held liable under § 1983 on a respondeat superior theory."); *see also Board of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 403, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997) ("We have consistently refused to hold municipalities liable under a theory of respondeat superior."). Instead, Congress intended to hold municipalities liable only when "action pursuant to official municipal policy of some nature caused a constitutional tort." *Monell*, 436 U.S. at 691. "The 'official policy' requirement 'was intended to distinguish acts of the municipality from acts of employees of the municipality,' and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-80, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986) (emphasis in original).

Although a constitutional violation must result from "official municipal policy," a county need not expressly adopt the policy. It is sufficient that the constitutional violation occurred pursuant to a "longstanding practice or custom." *Gillette v. Delmore*, 979 F.2d 1342, 1346 (9th Cir.1992); *see Brown*, 520 U.S. at 404 ("[A]n act performed pursuant to a 'custom' that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law.").

Plaintiffs cannot satisfy the requirement of a longstanding practice or custom, because they allege to the contrary that a county official has singled them out for unique treatment. A single constitutional deprivation ordinarily is insufficient to establish a longstanding practice or custom. *See Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir.1996) ("Liability for improper custom may not be predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy."); *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443-44 (9th Cir.1989) ("Consistent with the commonly understood meaning of custom, proof of random acts or isolated events [is] insufficient to establish custom.").

There are, however, three situations in which isolated constitutional violations are sufficient to establish a municipal "policy." We consider each in turn.

A. Final Policymaking Authority

First, a municipality can be liable for an isolated constitutional violation when the person causing the violation has "final policymaking authority." *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 123, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988) (plurality) ("[O]nly those municipal officials who have 'final policymaking authority' may by their actions subject the government to § 1983 liability."); *Gillette*, 979 F.2d at 1347 ("[T]he Supreme Court held that a single decision by a municipal policymaker may be sufficient to trigger section 1983 liability under Monell, even though the decision is not intended to govern future

situations."). Whether an official has final policymaking authority is a question for the court to decide based on state law. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989) ("[W]hether a particular official has 'final policymaking authority' is a question of state law. As with other questions of state law relevant to the application of federal law, the identification of those officials whose decisions represent the official policy of the local government unit is itself a legal question to be resolved by the trial judge before the case is submitted to the jury.") (emphasis in original) (citations and internal quotation marks omitted).

The district court held that Hawaii Prosecutor Kimura possessed final policymaking authority to decide whom to prosecute and whether to approve plea agreements. *See, e.g., Marsland v. First Hawaiian Bank*, 70 Haw. 126, 130, 764 P.2d 1228 (1988) (County prosecutors have been delegated "primary authority and responsibility for initiating and conducting criminal prosecutions within their respective county jurisdictions."); *Amemiya v. Sapienza*, 63 Haw. 424, 427, 629 P.2d 1126 (1981) (stating the same principle). On appeal, the County does not dispute that holding.

Plaintiffs allege, however, that deputy prosecutor Iopa violated their constitutional rights. "Authority to make municipal policy may be . . . delegated by an official who possesses such authority. . . . " *Praprotnik*, 485 U.S. at 124 (citation and internal quotation marks omitted). Thus, the first question on appeal is whether

Kimura (or Kimura's predecessor Ono)[2] delegated to Iopa final policymaking authority to decide whom to prosecute and whether to approve plea agreements.[3]

The Court in *Praprotnik* recognized that "special difficulties" arise when a plaintiff alleges that an official has delegated policymaking authority:

> If the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from respondeat superior liability. If, however, a city's lawful policymakers could insulate the

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[2] When Plaintiffs were indicted, Kimura had not yet been elected County Prosecutor; he was serving as First Deputy Prosecutor (second in command).

[3] In the prior appeal in this case, this court stated:

> It is unclear who other than the county prosecutor can make policy for the county in initiating prosecutions. As noted above, the county prosecutor's authority stems from the attorney general. If the attorney general does not intrude into county prosecutions, Christie and Anderson may be entitled to judgment as a matter of law that Iopa and Kimura were acting as policymakers. Because no such motion was made before the district court, however, we decline to reach that issue at this time.

Christie v. Iopa, 121 F.3d 714 (9th Cir.1997) (unpublished table decision) (emphasis added); *see* 9th Cir. R. 36-3 (allowing the citation to an unpublished disposition when relevant as law of the case). As is apparent, the court declined to decide whether Iopa had final policymaking authority. The mere suggestion that Iopa might possess that authority does not bind us now. *See Ruff v. Sullivan*, 907 F.2d 915, 918 (9th Cir.1990) ("This panel is not bound by dicta from prior cases. . . . ") (citation and internal quotation marks omitted); *Export Group v. Reef Indus., Inc.*, 54 F.3d 1466, 1471-73 (9th Cir.1995) (stating the same principle).

> government from liability simply by delegating their policymaking authority to others, § 1983 could not serve its intended purpose.

Id. at 126. The question therefore becomes whether the policymaker merely has delegated discretion to act, or whether it has done more by delegating final policymaking authority:

> [I]f county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board. However, if the Board delegated its power to establish final employment policy to the Sheriff, the Sheriff's decisions would represent county policy and could rise to municipal liability.

Pembaur, 475 U.S. at 483 n. 12 (emphasis in original); *see Fiorenzo v. Nolan*, 965 F.2d 348, 351 (7th Cir.1992) ("[A] municipality is not liable merely because the official who inflicted the alleged constitutional injury had the discretion to act on its behalf; rather, the official in question must possess final authority to establish municipal policy with respect to the challenged action."). In making these determinations, courts consider whether the official's discretionary decision is "constrained by policies not of that official's making" and whether the official's decision is "subject to review by the municipality's authorized policymakers." *Praprotnik*, 485 U.S. at 127.

Applying those principles, the court in *Hyland v. Wonder*, 117 F.3d 405 (9th Cir.), *as amended*, 127 F.3d 1135 (9th Cir.1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1166, 140 L.Ed.2d 177 (1998), held that there had been a delegation of final policymaking authority. There, the San Francisco superior court judges possessed final policymaking authority over the Juvenile Probation Department. *See id.*, 117 F.3d at 415. The superior court judges, however, "left the internal management of the Juvenile Probation Department to [the chief juvenile probation officer] and attempted not to interfere." *Id.* (internal quotation marks omitted). The superior court judges also "did not formulate any policy" regarding internal management of the department. *Id.* (internal quotation marks omitted). The delegation thus satisfied both criteria identified in Praprotnik. Not surprisingly, then, this court held that the superior court judges had delegated final policymaking authority to the chief juvenile probation officer. *See id.* at 415-16.

By contrast, this court has refused to hold that the Los Angeles chief of police had delegated final policymaking authority to rank-and-file police officers. *See Trevino*, 99 F.3d at 920 ("The police officers who shot Bahena were not 'officials with final policy-making authority' and they were not ordered to shoot by the police chief, the City Council or anyone else possessing final policy-making authority."); *Los Angeles Police Protective League v. Gates*, 907 F.2d 879, 882-83, 890 (9th Cir.1990) (stating a similar proposition).[4]

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[4] Plaintiffs assert that this court in *Fazio v. City and County of San Francisco*, 125 F.3d 1328 (9th Cir.1997), *cert. denied*, ___ U.S.

As will be discussed below, the delegation at issue here is unlike the delegation in *Hyland*. Instead, it is similar to the delegation in *Trevino* and *Gates*.

Specifically, the Hawaii charter gives the prosecutor the authority to "appoint deputies." County of Hawaii Charter § 9-4 (1991). The charter does not define the duties or powers of deputy prosecutors. *Citing Okuda v. Ching*, 71 Haw. 140, 785 P.2d 943 (1990) (per curiam), Plaintiffs argue that the Hawaii Supreme Court has held that deputy prosecutors possess final policymaking authority. We are not persuaded.

In *Okuda*, the prosecutor for the City and County of Honolulu recused himself from any involvement in the defendant's case. *See id.* at 142, 785 P.2d 943. Before the recusal, the prosecutor's office had appointed a private lawyer to serve as the deputy prosecutor for the case. *See id.* at 141-42, 785 P.2d 943. The defendant argued that,

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___, 118 S.Ct. 1517, 140 L.Ed.2d 670 (1998), held that deputy prosecutors have policymaking authority under San Francisco's charter. However, Fazio did not purport to interpret Hawaii law. Moreover, Plaintiffs misunderstand Fazio.

This court did hold that deputy prosecutors in San Francisco are policymakers for the purpose of political patronage liability. *See id.* at 1333. However, the court stated that "policymaker" has a different meaning in that context:

> [T]he term policymaker as used in this context does not mean "one who makes policy." Rather, the term refers to a position in which political considerations are "appropriate requirement[s] for the effective performance of the public office involved." *Id.* (emphasis added) (citation omitted) (alteration in original).

once the prosecutor had recused himself, the private lawyer could not serve as a deputy prosecutor, because the charter allowed private lawyers to try cases only under the "direction of the prosecuting attorney." *Id.* at 143-44, 785 P.2d 943. The Hawaii Supreme Court disagreed:

> This contention founders on the rock of common sense. There is no way, given the volume of criminal cases handled by the prosecuting attorney of the City and County of Honolulu, that the prosecutor can personally supervise each and every case.
>
> Under Charter § 8-105, the prosecuting attorney is empowered to appoint deputies, and under the provisions of Charter § 8-104, it is obvious that it is intended that those deputies may perform the functions of the prosecutor. . . .
>
> So also the supervision of private counsel, employed for a particular case, can be accomplished by a duly appointed deputy.

Id. at 144-45, 785 P.2d 943.

The Hawaii court's decision in *Okuda* establishes that deputy prosecutors have the power to perform many of the duties assigned to the prosecutor and that, in the process, they necessarily exercise broad discretion. As noted above, however, delegating discretion is not equivalent to delegating final policymaking authority. *See Praprotnik*, 485 U.S. at 126 ("If the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from respondeat superior liability."). Nothing in *Okuda* suggests that a county prosecutor necessarily delegates final policymaking authority to deputy prosecutors; at most,

Okuda holds that a county prosecutor can delegate that authority. However, the record reveals that the County Prosecutor did not choose to make such a delegation to Iopa here.

The County Prosecutor, not Iopa, created "general policies" for determining when to charge a defendant. More significantly, Iopa's immediate supervisor, Ashida, adopted policies for the initiation of felony prosecutions, including the creation of a screening process that he used to decide whom to prosecute. As part of that process, Ashida made sure that all necessary information was in a defendant's file. Based on that information, Ashida then determined whether there was admissible evidence that proved beyond a reasonable doubt that a defendant had committed the crime alleged. If there was such evidence, Ashida prepared a subpoena request form, listed all the necessary grand jury witnesses, and drafted a proposed indictment. He then assigned the case to a deputy prosecutor to present the case to the grand jury.

Ashida applied that procedure in Plaintiffs' case. He, rather than Iopa, made the initial decision to prosecute Plaintiffs. Under the screening process, deputy prosecutor Iopa then had the authority to "review [the] proposed indictment, make any changes, or contact [Ashida] if she had any concerns." If Iopa disagreed with Ashida's decision to prosecute Plaintiffs, she had to contact Ashida; she could not decide unilaterally to drop the case.

The foregoing discussion establishes that Iopa lacked final policymaking authority to initiate or terminate prosecutions. Her decision to prosecute a case was constrained by policies not of her making, and she was

subject to review by the municipality's authorized policymakers.

Iopa likewise lacked final policymaking authority over plea agreements. First, the County Prosecutor, not Iopa, created standards and criteria to govern plea agreements. Second, although Iopa exercised discretion when making and negotiating plea agreements, she generally did not have authority to enter into those agreements when significant concessions were at stake: "All felony plea agreements which contemplate the reduction [or] dismissal of charges shall be approved by the First Deputy or the Prosecuting Attorney." Again, Iopa's plea agreements were constrained by policies not of her making, and her significant plea agreements were subject to review by the municipality's authorized policymakers. That being so, she lacked final policymaking authority over plea agreements.

In summary, the district court did not err by holding that Iopa lacked final policymaking authority to decide whom to prosecute and whether to approve plea agreements.

B. Ratification

A municipality also can be liable for an isolated constitutional violation if the final policymaker "ratified" a subordinate's actions. *See Praprotnik*, 485 U.S. at 127. Ordinarily, ratification is a question for the jury. *See Fuller v. City of Oakland*, 47 F.3d 1522, 1534 (9th Cir.1995). However, as with any jury question, a plaintiff must establish that there is a genuine issue of material fact regarding whether a ratification occurred. *See, e.g., Covey v. Hollydale*

Mobilehome Estates, 116 F.3d 830, 834 (9th Cir.), *as amended*, 125 F.3d 1281 (9th Cir.1997). The district court held that Plaintiffs could not satisfy that requirement.

1. Christie

The district court correctly concluded that plaintiff Christie cannot establish ratification. To show ratification, a plaintiff must prove that the "authorized policymakers approve a subordinate's decision and the basis for it." *Praprotnik*, 485 U.S. at 127; *see Gillette*, 979 F.2d at 1348 (refusing to find ratification, because "[t]here is no evidence that the City manager made a deliberate choice to endorse the Fire Chief's decision and the basis for it"). Accordingly, ratification requires, among other things, knowledge of the alleged constitutional violation. *See Garrison v. Burke*, 165 F.3d 565, 572 n. 6 (7th Cir.1999) (holding that the municipality was not liable under § 1983, because it had no knowledge of the alleged constitutional violations); *Gattis v. Brice*, 136 F.3d 724, 727 (11th Cir.1998) (stating a similar proposition).

Christie provided no evidence, in conjunction with his summary judgment motion, that Kimura knew of Iopa's actions before the criminal case against him was dismissed (i.e., before the alleged constitutional violations ceased).[5] That being so, Christie has not established

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[5] In his motion for reconsideration, Christie produced, for the first time, newspaper articles that suggested that Kimura knew of Iopa's alleged constitutional violations. However, we do not consider evidence or arguments presented for the first time in a motion for reconsideration. *See* Fed.R.Civ.P. 56(c) (party opposing summary judgment may serve opposing

a genuine issue of material fact as to the question whether Kimura ratified Iopa's actions.

2. Anderson

After Christie's case was dismissed, but while Anderson's case was still pending, both Plaintiffs filed this action against Kimura. Anderson alleged that Iopa had violated, and was continuing to violate, his constitutional rights. Filing the action thus provided Kimura with notice of Iopa's alleged ongoing constitutional violations. *See Link v. Wabash R.R. Co.*, 370 U.S. 626, 634, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) ("[E]ach party is . . . considered to have notice of all facts, notice of which can be charged upon the attorney.") (citation and internal quotation marks omitted); *Henry v. County of Shasta*, 132 F.3d 512, 518 (9th Cir.1997) ("It is a reasonable inference – indeed, the only reasonable inference – that after Henry filed suit and successfully served process against the county, it knew about the alleged malfeasance of its employees at the jail."), *as amended*, 137 F.3d 1372 (9th Cir.), *cert. denied*, ___ U.S. ___, 119 S.Ct. 59, 142 L.Ed.2d 46 (1998).

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affidavits "prior to the day of hearing"); *Self Realization Fellowship Church v. Ananda Church of Self-Realization*, 59 F.3d 902, 912 (9th Cir.1995) ("A party does not properly preserve an issue for appeal by raising it for the first time in a motion for reconsideration."); *Bally Export Corp. v. Balicar, Ltd.*, 804 F.2d 398, 404 (7th Cir.1986) ("Although the defendants attempted to raise the argument in their motion for reconsideration, a motion for reconsideration is an improper vehicle to introduce evidence previously available or to tender new legal theories.").

A policymaker's knowledge of an unconstitutional act does not, by itself, constitute ratification. Instead, a plaintiff must prove that the policymaker approved of the subordinate's act. For example, it is well-settled that a policymaker's mere refusal to overrule a subordinate's completed act does not constitute approval. *See Weisbuch v. County of Los Angeles*, 119 F.3d 778, 781 (9th Cir.1997) ("To hold cities liable under section 1983 whenever policymakers fail to overrule the unconstitutional discretionary acts of subordinates would simply smuggle respondeat superior liability into section 1983.") (citation and internal quotation marks omitted); *Gillette*, 979 F.2d at 1348 (stating the same principle).

Here, however, there is more. A rational trier of fact could conclude that Kimura affirmatively approved of Iopa's alleged ongoing constitutional violations.

First, Kimura took part in some of the plea negotiations with Anderson. According to Anderson's evidence, Kimura indicated during the negotiations that he would not prosecute anyone else in the future for possession of commercial sterilized hemp seeds. Kimura's statement, if proved at trial, permits an inference that he approved of Iopa's selective prosecution of Anderson.

Second, around that same time, Anderson's private investigator purchased commercial sterilized hemp seeds from Walmart and Miranda Country Stores, for use in Anderson's defense (to show that commercial sterilized hemp seeds are readily available in Hawaii). Kimura notified the police of the investigator's possession of hemp seeds; he did not, however, notify the police of Walmart's or Miranda's sale of hemp seeds. Again,

Kimura's actions permit an inference that he approved of Iopa's selective prosecution of Anderson.

Although Kimura's actions may have an innocent explanation, on summary judgment the only question is whether a rational juror could infer a noninnocent explanation. A rational juror could infer that Kimura's acts showed affirmative agreement with Iopa's actions. In the circumstances, the district court erred by granting summary judgment to Defendants on Anderson's claim that Kimura ratified Iopa's alleged constitutional violations.

C. Deliberate Indifference

The Supreme Court did not mention deliberate indifference as an exception to the single-incident rule in *Praprotnik*. After the Supreme Court decided *Praprotnik*, however, the Court adopted "deliberate indifference" liability and suggested that it can apply to single-incident cases. *See City of Canton v. Harris*, 489 U.S. 378, 390, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989) ("But it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.").[6] This court has applied this form of liability to single-incident cases. *See Fuller*, 47

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[6] The Supreme Court in *Brown* assumed without deciding that single-incident liability applied to the policy at issue there. *See Brown*, 520 U.S. at 412.

F.3d at 1535; *Hammond v. County of Madera*, 859 F.2d 797, 803 (9th Cir.1988).[7]

As with ratification, a plaintiff must establish a genuine issue of material fact as to the question whether the final policymaker acted with deliberate indifference to the subordinate's constitutional violations. *See Fuller*, 47 F.3d at 1534-35. The district court held that Plaintiffs could not satisfy that requirement.

1. Christie

"[D]eliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Brown*, 520 U.S. at 410 (emphasis added) (internal quotation marks omitted); *see Jensen v. City of Oxnard*, 145 F.3d 1078, 1082 (9th Cir.) (stating the same principle), *cert. denied*, ___ U.S. ___, 119 S.Ct. 540, 142 L.Ed.2d 449 (1998). There is no evidence that Kimura knew anything of Iopa's actions before the criminal case against Christie was dismissed.

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[7] In *Fuller* and *Hammond*, this court suggested that the appropriate standard for liability was either gross negligence or reckless indifference. However, after those decisions, this court has made clear that a plaintiff must prove deliberate indifference. *See L.W. v. Grubbs*, 92 F.3d 894, 900 (9th Cir.1996) ("We conclude that . . . the plaintiff must show that the state official participated in creating a dangerous condition, and acted with deliberate indifference to the known or obvious danger in subjecting the plaintiff to it.").

In the circumstances, Christie is left to argue that Kimura's general policy of delegating discretion to deputy prosecutors obviously would result in Iopa's alleged constitutional violations. The Supreme Court has emphasized the danger of permitting liability for such a facially valid policy:

> Where a claim of municipal liability rests on a single decision, not itself representing a violation of federal law and not directing such a violation, the danger that a municipality will be held liable without fault is high. Because the decision necessarily governs a single case, there can be no notice to the municipal decisionmaker, based on previous violations of federally protected rights, that his approach is inadequate. Nor will it be readily apparent that the municipality's action caused the injury in question, because the plaintiff can point to no other incident tending to make it more likely that the plaintiff's own injury flows from the municipality's action, rather than from some other intervening cause.

Brown, 520 U.S. at 408.

In this action, holding the municipality liable for Kimura's general policy of delegating discretion to deputy prosecutors would be tantamount to adopting respondeat superior liability. That result is impermissible. *See, e.g., Monell*, 436 U.S. at 691 ("[A] municipality cannot be held liable under § 1983 on a respondeat superior theory."). The district court correctly held that, as a matter of law, Christie cannot demonstrate deliberate indifference.

2. Anderson

Kimura obtained notice of Iopa's alleged constitutional violations when Anderson filed this action. The evidence that Anderson presented in opposition to the motion for summary judgment would permit a rational trier of fact to find that Kimura then deliberately chose to allow Iopa's constitutional violations to continue. Thus, the district court erred by holding that, as a matter of law, Anderson could not prove deliberate indifference.

D. Conclusion

We emphasize first what we do not hold: The County is not potentially liable because Iopa was one of its employees or because Kimura delegated discretion to her. We hold only that Anderson has created a triable issue of fact on liability. He produced evidence permitting a rational trier of fact to find that Kimura, a person with final policymaking authority, knew of Iopa's alleged ongoing constitutional violations and (1) approved of those violations or (2) was deliberately indifferent to them. We therefore reverse the district court's grant of summary judgment as to Anderson.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS. Each party is to bear its own costs on appeal.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ROGER CHRISTIE and ERNEST AARON ANDERSON, Plaintiffs, VS. G. KAY IOPA, in her personal capacity, et al., Defendants.	CV NO. 95-01026DAE

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; GRANTING IN PART AND DENYING IN PART PLAINTIFFS' COUNTERMOTION FOR PARTIAL SUMMARY JUDGMENT; AND DENYING PLAINTIFFS' MOTION FOR SANCTIONS

(Filed Apr. 6, 1998)

The court heard the instant motions on March 30, 1998. Steven D. Strauss, Esq., appeared at the hearing on behalf of Plaintiffs; Steven Christensen, Esq., and Richard D. Wurdeman, Esq., appeared at the hearing on behalf of Defendant County of Hawaii. After reviewing the motions and the supporting and opposing memoranda, the court GRANTS Defendant's Motion for Summary Judgment; GRANTS in part DENIES in part Plaintiffs' motion for Partial Summary Judgment; and DENIES Plaintiffs' Motion for Sanctions.

BACKGROUND

This case arises out of the state prosecution of the Plaintiffs, Roger Christie ("Christie") and Ernest Aaron Anderson ("Anderson") (together "Plaintiffs"), for the possession of hemp seeds. Plaintiffs allege that they were prosecuted solely because of their activities advocating the use of hemp and hemp seed in cooking and other commercial uses.

In April 1992, Plaintiffs were indicted for promotion of a detrimental drug in the second degree, a felony in the State of Hawaii. In their Complaint, Plaintiffs allege that G. Kay Iopa ("Iopa"), the Deputy Prosecutor, presented false evidence to the grand jury regarding seed germination.

On October 30, 1995, the criminal charges against Plaintiff Christie were dropped without prejudice. Charges against Plaintiff Anderson are still pending at the state level.

On December 15, 1995, Plaintiffs filed a Complaint in this court against Iopa and Jay T. Kimura, the Prosecuting Attorney for the County of Hawaii ("Kimura"), in their individual capacities and against the Defendant County of Hawaii ("County"). Plaintiffs request injunctive relief, monetary damages, and punitive damages, as redress for the violations of their constitutional rights. Plaintiffs allege that Defendants infringed on their freedom of speech, their right to petition the government, their right to engage in commerce, and to be free from government oppression. On May 20, 1996, Plaintiffs filed an Amended Complaint which differed from the original Complaint

only in that Plaintiffs no longer requested punitive damages.

Defendants moved for judgment on the pleadings, or alternatively County moved for partial summary judgment in its favor, or alternatively, Defendants moved to dismiss without prejudice or to stay the action pending resolution of the parallel state proceedings, and to compel the Plaintiffs to file a reply to Defendant County of Hawaii's affirmative defense negating any unconstitutional policy, custom, or practice. In an order dated September 20, 1996, the court made several rulings. The court sua sponte granted Defendants Iopa and Kimura judgment on the pleadings as to any claims against them in their individual capacity. The court denied the County of Hawaii's Motion for Judgment as a Matter of Law, and Motion for Partial Summary Judgment based upon Eleventh Amendment Immunity. The court also denied Defendants, Motion to Stay the Proceedings. Defendants appealed the issue of Eleventh Amendment Immunity, and on September 22, 1997, the Ninth Circuit issued an order affirming this court's Order that the County was not entitled to protection by the Eleventh Amendment.

On February 10, 1998, County filed a Motion for Summary Judgment. On March 12, 1998, Plaintiff filed a Countermotion for Partial Summary Judgment and Defendant County of Hawaii replied on March 18, 1998. On March 12, 1998, Plaintiffs also filed a Countermotion for Sanctions against County.

STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered when:

> . . . the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The moving party has the initial burden of "identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986)). The movant must be able to show "the absence of a material and triable issue of fact," *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987), although it need not necessarily advance affidavits or similar materials to negate the existence of an issue on which the nonmoving party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 323. *But cf., Id.*, at 328 (White, J., concurring).

If the moving party meets its burden, then the opposing party may not defeat a motion for summary judgment in the absence of any significant probative evidence tending to support his legal theory. *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 282 (9th Cir. 1979) The opposing party cannot stand on his pleadings, nor can he simply assert that he will be able to discredit the movant's evidence at trial. *See T.W. Elec.*, 809 F.2d at 630. Similarly, legal memoranda and oral argument are not

evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). Moreover, "if the factual context makes the nonmoving party's claim *implausible*, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." *Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir. 1987), (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)) (original emphasis).

The standard for a grant of summary Judgment reflects the standard governing the grant of a directed verdict. *See Eisenberg v. Insurance Co. of North America*, 815 F.2d 1285, 1289 (9th Cir. 1987) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). Thus, the question is whether "reasonable minds could differ as to the import of the evidence." *Eisenberg*, 815 F.2d at 1289.

However, when "direct evidence, produced by the moving party conflicts with "direct evidence" produced by the party opposing summary judgment, "the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact." *T.W. Elec.*, 809 F.2d at 631. Also, inferences from the facts must be drawn in the light most favorable to the nonmoving party. *Id.* These inferences may be drawn both from underlying facts that are not in dispute, as well as from disputed facts which the judge is required to resolve in favor of the nonmoving party. *Id.*

Genuine factual issues must be supported by significant probative evidence. *Commodity Futures Trading*

Comm'n v. Savage, 611 F.2d 270, 282 (9th Cir. 1979). Hence, the non-moving party may not stand on its pleadings or merely assert it will controvert the movant's evidence at trial. *See T.W. Elec.*, 809 F.2d at 630. Simple disagreement about a material issue of fact, therefore, no longer precludes the use of summary judgment. *California Architectural Bldg. Prod.*, 818 F.2d at 1468.

DISCUSSION

I. Summary Judgment.

As noted in the court's September 20, 1996 Order, Municipal liability under § 1983 is limited to those instances when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may be fairly said to represent official policy, inflicts the injury. . . . " *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 694 (1978). "A single action by the final decisionmaker may be sufficient to establish that a municipality has a policy that infringes on a person's constitutional rights. *Los Angeles Police Protective League v. Gates*, 907 F.2d 879, 889 (9th Cir. 1990).

County brings the instant Motion for Summary Judgment asserting that "there is no pattern, custom or practice involved, the instant case stands or falls upon whether a "high level policymaker" could establish a "policy" founded upon a "single-instance" decision." Motion at 1. In its September 20, 1996 Order, this court found that "Plaintiffs have produced sufficient evidence to raise a genuine issue of fact as to [whether] Iopa held final policymaking authority in this instance." September 20, 1996 Order at 15. County contends that it is entitled to

a renewed motion for summary judgment on this issue because of additional factual development. Defendants' Reply at 6. The court normally would not consider a second motion for summary judgment on the very same issue previously addressed, however, in this instance, Defendants filed their second motion within the scheduling deadlines, and have asserted the inclusion of new evidence. Furthermore, on reexamination of the issue, the court notes that the court, and not the jury, must make a determination identifying the policymakers on the issue of prosecutions in the County of Hawaii. Therefore, the court will consider Defendants' second Motion for Summary Judgment on the issue of liability under § 1983.

The law today is the same as it was at the time of the court's previous order. Municipalities and local governments may be held liable as "persons" under 42 U.S.C. § 1983 for actions which result in a deprivation of constitutional rights. *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 690 (1978). However, a local government cannot be held liable on a respondeat superior theory. *Id.* at 691. Likewise, a local government cannot be absolved from liability because the individuals are shielded by absolute immunity. *See Reed v. City and County of Honolulu*, 76 Haw. 219, 228 (1994).

Municipal liability is incurred under § 1983 only when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may be fairly said to represent official policy, inflicts the injury. . . . " *Id.* at 694. A charge of municipal liability is sufficient if the plaintiff alleges that the individual defendants' conduct conformed to official policy, custom, or practice. *Karim-Panahi v. Los Angeles Police*

Dep't, 839 F.2d 621, 624 (9th Cir. 1988). "A single action by the final decisionmaker may be sufficient to establish that a municipality has a policy that infringes on a person's constitutional rights." *Los Angeles Police Protective League v. Gates*, 907 F.2d 879, 889 (9th Cir. 1990).

In *City of Saint Louis v. Praprotnik*, 485 U.S. 112 (1988) (plurality opinion), the Supreme Court identified four guiding principles for determining whether a decision on a single occasion establishes municipal policy exposing the municipality to liability for the actions of its agents carrying out that policy. First, a municipality may be liable only for " 'acts which the municipality has officially sanctioned or ordered.' " (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986)). Second, an official must have "final policymaking authority" in order to subject the municipality to liability. *Id.* Third, whether the official has such final authority is a question of state law. *Id.* Fourth, the official must have been "responsible under state law for making policy in that area of the city's business," *id.*; that is, if the policy were lawful, the official would have been acting within the scope of the official's authority. "[A] city [county] cannot escape liability for the consequences of established and ongoing departmental . . . simply by permitting such basic policy decisions to be made by lower level officials who are not ordinarily considered policymakers." *Chew v. Gates*, 27 F.3d 1432, 1445 (9th Cir. 1994).

Thus, there are two issues before the court on these cross-motions for summary judgment. First, the court must determine, pursuant to state law, whether Kimura and Iopa have final policymaking authority for the

County Prosecutor's Office, County of Hawaii.[1] For clarity, the court must find whether a single decision by either of these individuals is sufficient to establish a policy, that infringed on Plaintiffs' constitutional rights. The policy at issue here would be selective prosecution of Plaintiffs because of their vocal support of the legalization of marijuana. Second, the court must consider

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[1] Plaintiffs contend that the Ninth Circuit's decision regarding the appeal of this court's ruling that the County lacked protection under the Eleventh Amendment is controlling on the issue now before the court. In its memorandum decision, the Ninth Circuit stated in dicta:—

> it is plainly evident to us that a county prosecutor is the policymaker on behalf of the county regarding the decision to prosecute violations of the law, state or local. . . . It is unclear who other than the county [prosecutor] can make a policy for the county in initiating prosecutions. As noted above, the county prosecutor's authority stems from the attorney general. If the attorney general does not intrude into county prosecutions, Christie and Anderson may be entitled to judgment as a matter of law that Iopa and Kimura were acting as policymakers.

Memorandum Decision at 5-6.

The court is cognizant that the Ninth Circuit offered guidance to this court, however, this court is required to make an independent determination of whether Defendants Iopa and Kimura are in fact policymakers based upon state law. The Ninth Circuit was not required to determine whether Defendants Iopa and Kimura are vested with policymaking authority. The sole issue on review at the Ninth Circuit was whether this court was correct in its determination that the Eleventh Amendment did not bar suits against the County Prosecuting Attorney's Office of the County of Hawaii. Thus, the guidance offered by the Ninth Circuit is not controlling on the issue currently before the court.

whether there is a genuine triable issue of fact regarding the existence of the policy, and whether county officials acted in accordance with the policy, thereby infringing Plaintiffs' constitutional rights.

A. Are Kimura and Ioya policymakers?

1. Kimura.

Kimura is the Prosecuting Attorney for the County of Hawaii. He was sworn in as Prosecuting Attorney on December 2, 1992, and therefore he was not Prosecuting Attorney for the County of Hawaii during the time that Plaintiffs were indicted, however he was Prosecuting Attorney throughout the criminal proceedings.

County's posture is that it "is by no means clear that Prosecutor Kimura is a county "policymaker" for purposes of § 1983 'single-instance' liability." However, it appears that based upon Hawaii state law and the Charter of the County of Hawaii, that the County Prosecuting Attorney is a policymaker for purposes of § 1983 liability.

In determining which individuals are policymakers for § 1983 liability, the court must identify the individual official who speaks with final policymaking authority for the local government concerning the action alleged to have caused the violation. *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 737 '1989. Here, Plaintiffs insist that the action that caused the alleged violation is selective prosecution based upon the exercise of first amendment rights. Consequently, to determine § 1983 liability, the

court must identify the official who has the final policymaking authority as to prosecutions in the County of Hawaii.

The public prosecutor in Hawaii "has been delegated the primary authority and responsibility for initiating and conducting criminal prosecutions within his county jurisdiction." *Amemiya v. Sapienza*, 63 Haw. 424, 427 (1981). The Charter of the County of Hawaii sets forth that:

> The prosecuting attorney shall:
>
> (d) Institute proceedings, or direct the chief of police to do so, before the district judges for the arrest of persons charged with or reasonably suspected of public offenses, when the prosecuting attorney has information that any such offenses have been committed, and for that purpose take charge of criminal cases before the district judges, either in person or by a deputy or by such other prosecuting officer as the prosecuting attorney shall designate.
>
> (e) Draw all indictment and attend before and give advice to the grand jury. . . .
>
> (f) Investigate all matters which may properly come before the prosecuting attorney.

Section 9-3, County Charter, County of Hawaii (1991). The Prosecuting Attorney for the County of Hawaii is also provided with the authority to appoint "deputies and other necessary staff." Section 9-4, County Charter, County of Hawaii (1991). The language of the County Charter is clear that only the deputy designated "first deputy," shall assume the power of the prosecuting attorney in his absence. *Id.* The other deputies are given no

such power, and are not vested with the duties and obligations imposed upon the County Prosecuting Attorney.

While County does not provide the court any specific argument explaining why Kimura should not be considered a final policymaker for § 1983 purposes, any attempt to do so would be futile. Kimura, as the County Prosecuting Attorney for the County of Hawaii, is vested with great authority and leeway for prosecutions occurring within the County of Hawaii. Kimura, in his official capacity, is the final decisionmaker regarding who is to be prosecuted, investigated, or against whom charges should be brought. Section 9-3, County Charter, County of Hawaii (1991).

The court recognizes that the County Prosecuting Attorney is delegated responsibility to prosecute cases in his County by the Attorney General of the State of Hawaii. Nonetheless, the Hawaii Supreme Court in *Amemiya* indicated that "[t]he phrase 'under the authority of the attorney general' . . . cannot sensibly be construed as a reservation of power to usurp, at his sole discretion, the function of the public prosecutor." 63 Haw. at 427; 622 P.2d at 1129. The Prosecuting Attorney for the County of Hawaii, here Kimura, has the "primary authority and responsibility for initiating and conducting criminal prosecutions. . . . " in the County of Hawaii. *Marsland v. First Hawaiian Bank*, 70 Haw. 126, 130, 764 P.2d 1228, 1230-31 1988) (citing *Amemiya*, 63 Haw. at 427, 622 P.2d at 1129).

Based upon the above analysis, the court finds that for purposes of § 1983 liability, Kimura is a final policymaker regarding policies created in the Prosecuting

Attorney's Office for the County of Hawaii. Accordingly, the court DENIES County's Motion for Summary Judgment as to Kimura's position as a policymaker, and GRANTS Plaintiffs' Motion for Summary Judgment to that effect.

2. Iopa.

Iopa is a Deputy Prosecuting Attorney for the County of Hawaii. There is no indication that she is the first deputy prosecutor for the County of Hawaii. Iopa is the Deputy Prosecuting Attorney assigned to the prosecution of Plaintiffs. Plaintiffs contend that under Hawaii law, as a Deputy Prosecuting Attorney, Iopa acts as a policymaker. The policy allegedly created by Iopa is the prosecution of Plaintiffs based upon their "very vocal advocacy for the legalization of marijuana." Plaintiffs' Opp. at 5. Plaintiffs assert that felony charges were brought against "them in bad faith for improper, political purposes." *Id.*

Again, the conclusion as to whether Iopa is a policymaker for § 1983 liability must be viewed in terms of the alleged violation. The alleged violation here is bad faith prosecution in an attempt to suppress Plaintiffs' First Amendment rights, and selective prosecution based upon Plaintiffs, support of the legalization of marijuana. Hence, the question for the court is whether Iopa was vested with authority with regard to the charging decision and any plea agreements.

The County Charter of the County of Hawaii, does not support Plaintiffs' position that Iopa is a single

instance policymaker for purposes of § 1983 liability. The County Charter is clear that the Prosecuting Attorney is vested with absolute power with regard to charging decisions, and in his absence, the first deputy prosecuting attorney is vested with such authority. Sections 9-3 and 9-4, County Charter, County of Hawaii (1991). The County Charter does provide for the appointment of deputies and other staff, but does not specifically set forth their responsibilities or authority. *See* Section 9-4, County Charter, County of Hawaii (1991). Presumably, deputies are appointed to assist the Prosecuting Attorney in fulfilling the requirements of his position. However, there is nothing that suggests that there was a delegation to Iopa, from Kimura, of authority to make policy for the Prosecuting Attorney's Office for the County of Hawaii. *See Praprotnik*, 485 U.S. at 130 ("Simply going along with discretionary decisions made by one's subordinates, however is not a delegation to them of the authority to make policy.").

The United States Supreme Court in *Praprotnik* appropriately stated that

> [i]t would be a different matter if a particular decision by a subordinate was cast in the form of a policy statement and expressly approved by the supervising policymaker. It would also be a different matter if a series of decisions by a subordinate official manifested a "custom or usage" of which the supervisor must have been aware. . . . In both those cases, the supervisor could realistically be deemed to have adopted a policy that happened to have been formulated or initiated by a lower ranking official. But the

> mere failure to investigate the basis of a subordinate's discretionary decisions does not amount to a delegation of policymaking authority, especially where . . . the wrongfulness of the subordinate's decision arises from a retaliatory motive or other unstated rationale. In such circumstances, the purposes of § 1983 would not be served by treating a subordinate employee's decision as if it were a reflection of municipal policy.

Praprotnik, 485 U.S. at 130. Because there is no respondeat superior liability for municipalities in § 1983, the court must be cautious in holding a municipality responsible for actions of subordinates who are not expressly vested with the authority to make policy.

Here, the court is convinced that Iopa, while vested with a limited amount of discretion to act, is not a single instance policymaker for purposes of § 1983 liability. Plaintiffs attempt to impugn liability onto the County by asserting that Iopa acted in bad faith, and cite to instances in which Iopa does not appear to be acting in the most objective manner. Plaintiffs also point to the Hawaii Supreme Court's decision in *Okuda v. Chang*, 71 Haw. 140, 785 p.2d 944 (1990) for the proposition that delegation of case management responsibility "effectively delegates policymaking authority as well." Plaintiffs' Opp. at 8. Upon review of *Okuda*, the court does not find that it supports that proposition.

In *Okuda*, the Hawaii Supreme Court held that deputy prosecutors of the County of Honolulu, which has similar Charter provisions as the Charter for the County of Hawaii, may perform the functions of a prosecutor.

That case discussed whether it is necessary for the entire Prosecuting Attorney's Office to be recused or disqualified from a case merely because the Prosecuting Attorney himself is disqualified. *Okuda*, 71 Haw. at 144, 785 P. 2d at 946. The Court there held that

> [t1here is no way, given the volume of criminal cases handled by the prosecuting attorney . . . that the prosecutor can personally supervise each and every case. . . . Clearly, [the functions of the prosecutor] . . . were intended to be accomplished by a duly appointed deputy.

Id. The court agrees that deputy prosecutors are intended to aid the Prosecuting Attorney in the fulfillment of his duties, however, there is nothing in this case that suggests that along with the case management delegation, the Prosecuting Attorney also delegates policymaking authority.

In the instant case, Plaintiffs charge Iopa with initiating the criminal proceedings against them in bad faith, as a way to suppress their vocalization of the legalization of marijuana. However, it is significant that Iopa herself does not, and did not in this instance, make the decision to charge Plaintiffs. The Declaration of Lincoln T. Ashida is telling on this point. Declarant Ashida explains that he served as supervisor of felony prosecutions from February 20, 1991, to February 1, 1994. Declaration of Ashida at ¶ 5. In December of 1991, Declarant Ashida received Police Report No. D-57716, the drug case involving Plaintiffs, for screening. *Id.* at ¶¶ 6 and 13. The screening process includes ensuring that there is legal sufficiency to bring charges against the defendants. *Id.* at ¶ 16. Declarant Ashida declares that he did not know of Plaintiffs

personally, nor was he aware of their views regarding hemp, and he "formally "accepted" this case for prosecution on January 6, 1992 by affixing [his] initials on the referral form." *Id*, at 20 and 21. Declarant Ashida then prepared a "subpoena request form," and drafted a proposed indictment. *Id.* at ¶ 22. The case was then sent to Declarant Ashida's secretary, and it was forwarded to Iopa, who was the designated deputy prosecutor for the prosecution of felony drug cases. *Id.* at ¶¶ 22, 23 and 24. Plaintiffs do not rebut this declaration with any competent evidence that demonstrates that Iopa was the sole individual who made the charging decision with regard to their criminal indictment.

The initial decision and recommendation to prosecute Plaintiffs on drug charges was made by Declarant Ashida after he reviewed the police report. Iopa then made a review of the case file and records and "concurred with Deputy Prosecutor Ashida's assessment regarding the legal sufficiency of the case, and adopted the drafted proposed indictment without change or modification." Declaration of Iopa at ¶ 12. Thus, there is no evidence in the record that suggests that Iopa initially sought to indict and prosecute this action because of Plaintiffs vocalization regarding legalization of marijuana. In fact, both Declarant Ashida, and Iopa indicate that this report was processed in the normal course, and Plaintiffs were not targets of selective prosecution. Declaration of Ashida at ¶ 31; Declaration of Iopa at ¶ 14. Therefore, in the instant case, the initial charging decision was made by Declarant Ashida. In his declaration he explains that, after referral to Iopa, she "had authority to review [his] proposed indictment, make any changes, or

contact me if she had any concerns." Declaration of Ashida at ¶ 25. The declaration of Declarant Ashida indicates that if Iopa was concerned that there was not sufficient evidence to charge Plaintiffs, she was required to contact Declarant Ashida to discuss her concerns. Based upon the information provided to the court through declarations, it does not appear that Iopa had final decision making authority regarding whether to prosecute Plaintiffs. Additionally, it is clear, that the authority that she was vested with did not provide her the opportunity to make policy decisions for the County of Hawaii.

Plaintiffs also insist that Iopa was vested with authority regarding plea negotiations. Again, any authority granted to Iopa by Kimura in relation to charging decisions or plea negotiations, does not signify a grant of authority to make policy regarding the institution of criminal proceedings against a defendant, based upon the exercise of the defendant's First Amendment rights. Furthermore, while Iopa may present plea agreements or negotiate on behalf of the County Prosecutor's Office, the Office Policy of the Hawaii County Prosecutor's Office states that "[a]ll felony plea agreements which contemplate the reduction or dismissal of charges shall be approved by the First Deputy or the Prosecuting Attorney." Policy and Procedures Manual at 292, Exhibit 1 Defendants' Motion. Thus, the procedures set forth in the Manual shows that Iopa never had final decision making authority with regard to plea negotiations or agreements in Plaintiffs' criminal action. Either Kimura, or the First Deputy would have been required to approve of the plea agreement presented. Plaintiffs have presented no evidence that supports the contention that Iopa had final

decision making authority. Furthermore, even if such evidence was present, it does not show that Iopa had final policymaking authority with regard to the County Prosecuting Attorney's position on possession of marijuana seeds.

While the court agrees that Iopa's conduct is not without controversy, and that she may well have individually acted in bad faith with regard to her position and Plaintiffs' criminal case. Her aberrant behavior cannot be considered "policy" for purposes of § 1983 liability, as the record and state law does not support the contention that she had final policymaking authority, even as a "single-instance" policymaker. Hence, the court GRANTS County's Motion for Summary Judgment on this issue, and DENIES Plaintiffs' Motion for Summary Judgment as to this point.

B. Was there a policy created regarding prosecution of Plaintiffs based upon their vocal support for the legalization of marijuana?

While it is the court's responsibility to determine who are final policymaking officials for purposes of § 1983 municipal liability, unless it is demonstrated that there are no triable issues of fact, it is the jury's role to determine whether the decisions of the policymakers "have caused the deprivation of rights at issue by policies which affirmatively command that it occur. . . . " *Jett*, 491 U.S. at 737. Here, while the court is concerned that the facts of the case evidence that there were acts of impropriety conducted by Iopa, Plaintiffs have failed to meet their burden on summary judgment to provide evidence

of a policy at the Hawaii County Prosecuting Attorney's Office, instituted by Kimura and employed by Iopa, of selective prosecution of Plaintiffs based upon the exercise of their First Amendment rights.

First, the court points out that there is no evidence that suggests that the Prosecuting Attorney in office at the time Plaintiffs were indicted participated in the initial evaluation and decision to charge Plaintiffs with felony drug charges. Declarations submitted by Iopa, Ashida and Kimura explain that the screening and charging decision was made in the "normal" procedure. Plaintiffs have not identified competent evidence to suggest otherwise.

Second, there is evidence that Kimura participated in the plea negotiations on one occasion. However, there is no evidence that during the negotiations in October 1997, when Kimura was present, that there was any reference to a plea agreement that was conditioned on Plaintiffs agreement to not write letters to the newspapers.[2] *See*

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[2] There are objections raised by County with regard to references made to the content of the plea negotiations. County's position is that those references should not be admitted as competent evidence in this case because they were part of the plea negotiations and are excluded under Federal Rule of Evidence 408 and 410. However, it is important to note that the express language Federal Rule of Evidence 408 provides that "[e]vidence of [offers of compromise] . . . is not admissible to provide liability for or invalidity of the claim or its amounts." Rule 408 also states "[t]his rule does not require exclusion when the evidence is offered for another purpose." Here, Plaintiffs offer the discussion at the plea negotiations for "another purpose," to show bad faith or bias on the part of Defendants.

Furthermore, Rule 410 does not allow the admissibility of plea negotiations or discussions. The purpose of this Rule is to

Declaration of Neilani Graham at ¶ 2. Additionally, it appears that the Judge in the criminal matter actually contacted Kimura and asked him to come and join in the plea negotiations.

The complicity of Kimura in the plea negotiations would be significant if there was some showing that in his presence Iopa disregarded or attempted to suppress Plaintiffs' First Amendment rights, or some evidence that Kimura himself acted with such disregard. Kimura's direct involvement in the plea negotiations, and his alleged statements that he was concerned that "members of the public would try to coat sterilized hemp seeds with hashish oil,"[3] do not demonstrate the existence of a policy aimed at only prosecuting Plaintiffs on felony drug charges because they were vocal advocates of the legalization of marijuana.

Declarations submitted by Plaintiffs also describe that Kimura discussed a "proposed public announcement" that he would not prosecute anyone in the future for possession of "commercialized sterilized hemp seeds." *Id.* Plaintiffs submit that this discussion was made during the plea negotiations, and after Plaintiff Anderson

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protect the defendant's, and the government's, interest in a free negotiations process. The court finds that the interests that Rule 410 was intended to protect are not at issue here. This is a civil case essentially about prosecutorial misconduct. Evidence of the plea negotiations is necessary to demonstrate the validity or invalidity of Plaintiffs' contentions.

Thus, while County's objections are noted, the objections do not support the exclusion of the evidence of the plea negotiations.

[3] Declaration of De Lima at ¶ 3.

did not accept the plea arrangement, Kimura never made such a public announcement. *Id.* While this evidence shows that Kimura may have considered establishing a policy regarding prosecutions of those possessing sterilized hemp seeds, it does little to support Plaintiffs' position that they were selectively prosecuted, and that Kimura was an active participant in such a deprivation of their rights.

Third, the court finds that Francis Akamine's declaration is interesting, but not competent to show the existence of a policy put in place by Kimura, or that he in fact was aware of the actions taken by Iopa in Plaintiffs' criminal proceeding. Declarant Akamine describes a telephone conversation on February 14, 1997, with Kimura regarding the potential criminal charges against Layne Yoshida, an investigator used by the public defender's office in Plaintiff Anderson's case. Declaration of Akamine at ¶ 2. Declarant Akamine indicates that in preparation for the defense of Plaintiff Anderson, Mr. Yoshida purchased hemp seed from Hilo Walmart and from Miranda Country Store. *Id.* During this conversation, Kimura indicated that his office had referred the investigation of Mr. Yoshida to the Hawaii County Police Department. *Id.* at ¶ 4. While Yoshida was an investigator for the defense of Plaintiff Anderson, the investigation into his activities and the potential charges discussed by Kimura, do not substantiate claims made by Plaintiffs that Kimura was actively involved in the alleged "bad faith prosecution" brought against Plaintiffs.

Kimura, in his declaration, explains that there exists "no formal or informal office policy, custom, rule or procedure that would require or encourage the prosecution

of a defendant based upon their opinions, public statements, or otherwise expressed advocacy or viewpoint." Declaration of Kimura at ¶ 15. Plaintiffs make allegations that Kimura was involved, and knew of the allegedly wrongful conduct committed by Iopa, however, they do not provide competent, admissible evidence to substantiate their contentions. Since the court has no reason to believe that Kimura was directly involved in the decision making with regard to Plaintiffs, criminal case, the court also finds that there was no policy established or condoned by Kimura regarding the prosecution of Plaintiffs' criminal action.

Plaintiffs, at the hearing, argued that while respondeat superior liability is excluded from § 1983, according to *Fuller v. City of Oakland*, 47 F.3d 1522 (9th Cir. 1995), if Plaintiffs can show that Kimura acted with gross negligence or disregard for Plaintiffs' civil rights in not properly supervising Iopa, then liability can be found under § 1983. In *Fuller*, the Ninth Circuit stated that in that case,

> if Chief Hart's ambiguous testimony is interpreted to mean that he did review the case file – a case file arguably revealing a grossly inadequate investigation – and nevertheless approved the thoroughness of the investigation, then a jury could find that Hart acted with reckless disregard of Fuller's constitutional right not to have her investigation handled in a sexually-biased fashion.

47 F.3d at 1535. This language indicates that a plaintiff could possibly have a claim against a municipality based upon a deliberate indifference theory. However, in *Fuller*, there was evidence that Chief Hart actually reviewed the

case file and approved the thoroughness of an investigation that was allegedly conducted in an unconstitutional manner. *See id.* Here, there is no such evidence. At summary judgment Plaintiffs allegations that Kimura was aware of the statements and conduct of Iopa are not sufficient to meet their burden. Consequently, the court GRANTS County's Motion for Summary Judgment, and holds that the County is not liable under § 1983 as there is no evidence that a policy of selective prosecution of Plaintiffs existed at the time Of the indictment or throughout the proceedings.

II. Sanctions.

Plaintiffs move for sanctions pursuant to 28 U.S.C. § 1927, based upon their belief that the Ninth Circuit has already determined the issue before the court, and the fact that the court has previously ruled on a Motion for Summary Judgment, brought by Defendants, on the issue of § 1983 liability for the County. Plaintiffs argue that County brought this motion in bad faith, and recklessly raised a frivolous argument. Plaintiffs request sanctions because it was necessary for them to prepare a response to the County's Motion for Summary Judgment.

The court noted above, that it normally would not consider a second motion for summary judgment brought on the same issue as an earlier motion. In this instance, the court was required, by case law, to decide who has final policymaking authority at the County Prosecutor's Office. County submitted additional declarations and made arguments specific to that issue, allowing the court to make a proper determination on the merits.

This circumstance does not evince the requisite finding of bad faith necessary under 28 U.S.C. § 1927. Thus, the court DENIES Plaintiffs' Motion for Sanctions.

CONCLUSION

For the reasons stated above, the court GRANTS County's Motion for Summary Judgment; GRANTS in part and DENIES in part Plaintiffs' Motion for Summary Judgment; and DENIES Plaintiffs' Motion for Sanctions.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, April 6, 1998.

/s/ David Alan Ezra
DAVID ALAN EZRA
UNITED STATES
DISTRICT JUDGE

Roger Christie, et al. vs. G. Kay Iopa, et al., Civil No. 9501026 DAE; ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; GRANTING IN PART AND DENYING IN PART PLAINTIFFS' COUNTERMOTION FOR PARTIAL SUMMARY JUDGMENT; AND DENYING PLAINTIFFS' MOTION FOR SANCTIONS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

ROGER CHRISTIE and ERNEST AARON ANDERSON, Plaintiffs, vs. G. KAY IOPA, in her personal capacity, JAY KIMURA, in his personal capacity, the COUNTY OF HAWAII, and DOES 1-10, Defendant.	CV. NO. 95-01026 DAE

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

(Filed July 23, 1998)

Pursuant to Local Rule 7.2(d), the court finds this matter suitable for disposition without a hearing. After reviewing Plaintiffs' motion and the supporting and opposing memoranda, the court DENIES Plaintiffs' Motion for Reconsideration.

BACKGROUND

The facts and procedural background of this case have previously been set forth in this court's Order Granting Defendant's Motion for Summary Judgment; Granting in Part and Denying in Part Plaintiffs' Countermotion for Partial Summary Judgment; and Denying

Plaintiffs' Motion for Sanctions dated April 6, 1998. Therefore, the court need not revisit the facts in order to address Plaintiffs' Motion for Reconsideration.

STANDARD OF REVIEW

The disposition of a motion for reconsideration is within the discretion of the district court and will not be reversed absent an abuse of discretion. *Plotkin v. Pacific Telephone & Telegraph Co.*, 688 F.2d 1291, 1292 (9th Cir. 1982) There is a "compelling interest in the finality of judgments which should not be lightly disregarded. *Rogers v. Watt*, 722 F.2d 456, 459 (9th Cir. 1983).

The Ninth Circuit has articulated two goals that must be accomplished in order for a motion for reconsideration to succeed: "First, a motion for reconsideration must demonstrate some reason why the court should reconsider its prior decision. Second, a motion for reconsideration must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *Stein v. State Farm Mutual Automobile Insurance Company*, 934 F. Supp. 1171, 1173 (D. Haw. 1996). To justify reconsideration, three grounds have been established: 1) an intervening change in controlling law; 2) the availability of new evidence; and, 3) the need to correct clear error or to prevent manifest injustice. *Great Hawaiian Financial Corp. v. Aiu*, 116 F.R.D. 612, 616 (D. Haw. 1987), rev'd on other grounds, 863 F.2d 617 (9th Cir. 1988).

DISCUSSION

Plaintiffs bring the instant Motion for Reconsideration based upon their belief that

> A.: The Court committed manifest error of law and fact in granting summary judgment for Defendant County of Hawaii; B. The court committed manifest error of law and fact in denying Plaintiffs' motion for partial summary judgment relative to Defendant Iopa as policymaker; C. The Court erred in finding in its order at page 23 that Plaintiffs did not provide competent, admissible evidence to substantiate their contentions that Defendant Kimura was involved in *and* knew of the allegedly wrongful conduct by Iopa; D. The Court's decision is manifestly unjust because it provides Plaintiffs no remedy for a clear violation of their constitutional rights; and, E. Excusable neglect and newly discovered evidence permit Plaintiffs to obtain and submit additional evidence to the Court showing Kimura's involvement in greater detail.

Plaintiffs' Motion at 1-2.

This court takes very seriously its responsibility on a motion for reconsideration. motions for reconsideration are carefully reviewed, and the court's previous decision is scrutinized. Nonetheless, even after meticulous review of the court's previous decision, and of the arguments and materials submitted by Plaintiffs, the court finds that the motions previously before the court were properly decided in the April 6, 1998 Order.

The Supreme Court has explained that "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature

caused a constitutional tort." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691 (1978). Here, the parties do not dispute that Plaintiffs' allegations of selective prosecution amount to a constitutional tort. The issue before this court is whether the Plaintiffs have provided sufficient evidence to create a triable issue of fact that the alleged conduct was done pursuant to official municipal policy. The Supreme Court, in *Monell*, cautioned that civil liability should not be imposed under section 1983 based upon the existence of an employer-employee relationship, thus, a municipality should not be held vicariously liable for the acts of its employees. 436 U.S. at 692-694. "The 'official policy' requirement was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 479-480 (1986) (emphasis in original).

The Supreme Court has explained that "[m]unicipal liability attaches only where the decision-maker possesses final authority to establish municipal policy with respect to the action ordered." *Pembaur*, 475 U.S. at 481. The Court further explained that the "official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable." Id. at 483. Thus, the municipality cannot be responsible under section 1983 for acts done by an individual that is not delegated policy-making authority or such authority is not inherent in their position.

The court previously determined that Defendant Iopa ("Iopa") is not a single instance policy-maker. While Plaintiffs do not provide any new arguments or evidence,

they object to the court's characterization of Iopa. The court found that Iopa was not vested with final policy-making authority as to prosecutions at the County Prosecutor's Office. The court came to this conclusion only after careful review of the County Charter and the evidence presented. The court recognized that Iopa is vested with some discretion as to the particular cases assigned to her, however the discretion that she has with regard to particular cases does not demonstrate that she has the authority to make policy regarding prosecutions by the County Prosecutor's Office.

Plaintiffs have failed to demonstrate that the court committed manifest error by finding Iopa did not have the authority to make policy. If the court were to find that Iopa, as a Deputy Prosecuting Attorney for the County of Hawaii, was vested with policy-making authority for the County of Hawaii as to prosecutions, the result would be that several individuals, all of the Deputy Prosecuting Attorneys as well as the Prosecuting Attorney himself, would have final policy-making authority. Such a finding effectively ignores the role that the County Charter has established for the Prosecuting Attorney. Although Plaintiffs disagree with the court's conclusion, they have failed to provide the court with any new arguments or support for their position.

Plaintiffs assert that "the Court also misses the point of *Okuda v. Ching* [sic]. The case stands for the proposition that a deputy prosecutor's exercise of authority binds the Office of the Prosecutor." Plaintiffs' Motion at 10. Even assuming Plaintiffs' interpretation of *Okuda* is accurate, it does little to support their argument that the deputy prosecutors are policy makers for the County of

Hawaii. The issue is not whether the deputy prosecutors have the authority to bind the Prosecutor's Office, but whether the deputy prosecutors are vested with policy-making authority for the County of Hawaii. Thus, Plaintiffs' argument that the court "missed" the point of *Okuda* is not persuasive. In reality, the court's holding in *Okuda* simply does not support Plaintiffs' position.

In the April 6, 1998 order, the court also found that Plaintiffs "failed to meet their burden on summary judgment to provide evidence of a policy at the Hawaii County Prosecuting Attorney's Office, instituted by Kimura and employed by Iopa, of selective prosecution of Plaintiffs based upon the exercise of their First Amendment rights." April 6, 1998 Order Granting Defendants' Motion for Summary Judgment; Granting in Part and Denying in Part Plaintiffs' Countermotion for Summary Judgment; and Denying Plaintiffs' Motion for Sanctions at 20. Plaintiffs now complain that the court erred when it "restricted its view of selective prosecution to the date charges were brought against Plaintiffs and the bad faith allegations against Defendant Iopa." Plaintiffs' Motion at 2. In the April 6, 1998 Order, the court reviewed the bad faith allegations against Iopa, as well as the charging decisions and plea negotiations because these allegations constituted the evidence submitted by Plaintiffs in support of their cause of action. The court considered the allegations to determine whether they were sufficient to demonstrate the existence of a policy at the Prosecuting Attorney's Office.

To demonstrate that a policy of selective prosecution exists at the Hawaii County Prosecutor's Office, Plaintiffs have to show that there is a policy of prosecuting only

those individuals who purchased hemp seeds and are vocal advocates of legalization of marijuana. In general, selective prosecution is demonstrated by a showing that (1) others similarly situated have not been prosecuted for conduct similar to his, and (2) the government's discriminatory selection was based on impermissible grounds such as the exercise of First Amendment rights. *Wayte v. United States*, 470 U.S. 598, 604 (1985).

Plaintiffs argue that they met the burden of producing evidence that they were selectively prosecuted. While this may be true, evidence of selective prosecution is not sufficient. Because the County of Hawaii is the defendant, and this action is brought pursuant to 42 U.S.C. § 1983, Plaintiffs were required to produce sufficient evidence that evinces a showing not only that they were selectively prosecuted, but that it is the policy of the Hawaii County Prosecutor's Office to prosecute only those individuals who are vocal advocates of legalization of marijuana. Again, "municipalities may not be held liable under 42 U.S.C. § 1983 "unless action pursuant to official municipal policy of some nature caused a constitutional tort." " *Navarro v. Block*, 72 F.3d 712, 714 (9th Cir. 1995) (quoting *Monell*, 436 U.S. at 691). This is where Plaintiffs failed to meet their burden.

If there is an "official policy" or an unwritten custom or practice of depriving individuals of their constitutional rights, liability under section 1983 will attach against the County of Hawaii. *See City of St. Louis v. Prapotnik*, 485 U.S. 112 (1988). There is no evidence here of an official policy. There is no written policy at the Hawaii County Prosecuting Attorney's office that only vocal advocates of marijuana will be prosecuted for purchasing sterilized

hemp seeds while others are not. Plaintiffs assert that such a policy exists, however their evidence is based upon Iopa's actions. Plaintiffs submit that "the evidence shows that, acting on behalf of the prosecutor, Iopa not only prosecuted Plaintiffs in bad faith because they advocated legalization of marijuana, but she deselected others at the same time." Plaintiffs' Motion at 4. Nonetheless, it is necessary for them to show that Iopa acted pursuant to a policy established by the Prosecuting Attorney's Office or by the County. Since there is no evidence of a formal written policy, there is no triable issue of fact as to this issue.

A formal policy can also be shown if an employee with final decision-making authority for the County deliberately chooses to follow a course of action which deprives an individual of his constitutional rights. *Pembaur*, 475 U.S. at 483-84. Here, as the court has previously explained, Kimura is the County official with final decision-making/policy-making authority regarding prosecutions. Plaintiffs did not point the court to any evidence that suggests that Kimura was actively involved in the initial decision to prosecute Plaintiffs, and in the decision to continue the prosecution. Plaintiffs have not shown that Kimura ordered Iopa to continue the prosecution of Plaintiffs, and others similarly situated to Plaintiffs, because of their vocal support for the legalization of marijuana. Nor do Plaintiffs provide evidence that lopa was acting in conformity with suggestions from Kimura. Plaintiffs' inability to link Kimura to the decision to continue the prosecution of them because of their vocal belief in legalized marijuana is fatal to their section 1983 claim.

The mere fact that Kimura did not "disapprove of the prosecutions" does not demonstrate his complicity in a scheme to deprive Plaintiffs' of their constitutional rights. The fact that he did not order the charges against Plaintiffs to be dismissed also does not show that he allowed the prosecutions to continue merely because of Plaintiffs' vocal support for legalization of marijuana. The Supreme Court has held that "municipal liability under § 1983 attaches where – and only where – a deliberate choice to follow a course of action is made from among various alternatives by the official . . . responsible for establishing final policy with respect to the subject matter in question." *Pembaur v. City of Cincinnati,* 475 U.S. 469, 483-84 (1986). Plaintiffs need something more than just allegations, to meet their burden on summary judgment. They need to provide evidence that Kimura decided that the criminal actions should be maintained against Plaintiffs in order to deprive them of their constitutional rights. Without such evidence, there is no triable issue of fact as to this issue.

As noted, liability will also attach under section 1983 if there is an unwritten custom or practice of such selective prosecutions. The Ninth Circuit has concluded that a plaintiff can establish the existence of a custom or informal policy with evidence of repeated constitutional violations for which the errant municipal officials were not discharged or reprimanded. *See Gillette v. Delmore,* 979 F.2d 1342 (9th Cir. 1992).

There is no evidence of a custom or informal policy with regard to selective prosecution in order to suppress First Amendment rights. Plaintiffs provide evidence that

another individual was charged with purchasing sterilized hemp seeds, and that the charges against that defendant were dismissed once germination of the seeds proved unsuccessful. However, as pointed out by Plaintiffs, that defendant was not a vocal advocate of legalization of marijuana. Plaintiffs rely upon that case to support their argument that the sole reason the Prosecuting Attorney's Office continued to prosecute them after germination tests were completed was because they are vocal advocates of legalization of marijuana. They parallel their criminal case with the one that was dismissed after the seeds failed to germinate. Plaintiffs contend that the seeds purchased by them did not successfully germinate, and was it not for their First Amendment expression, their case would also have been dismissed. While this evidence may be useful in a state law tort claim for selective prosecution, it is not enough to hold a municipality liable under section 1983.

As the court has reiterated on several occasions, because their claim is brought pursuant to section 1983, Plaintiffs have the burden of demonstrating that a custom, policy or practice of depriving individuals of their constitutional rights exists. There is no formal policy at issue here, thus, Plaintiffs are required to show a custom or practice. However, Plaintiffs do not refer the court to other criminal cases in which the County Prosecuting Attorney's Office has allegedly selectively prosecuted individuals because of the exercise of their First Amendment rights. Evidence that previous criminal cases have been initiated or maintained in such a manner would create a triable issue of fact, however, as the court has

previously stated, Plaintiffs have failed to meet their burden.

Plaintiffs next argue that the court's previous Order is "manifestly unjust" because it leaves Plaintiffs without a remedy for "[c]lear [v]iolations [o]f [t]heir [c]onstitutional [r]ights." Plaintiffs' Motion at 11. This is not completely accurate. First, assuming Plaintiffs did not have another avenue to seek relief, the court cannot simply allow the claims against the County merely because of this. The law articulated by the Supreme Court with regard to municipal liability under section 1983 is clear, and this court cannot disregard that law in order to provide Plaintiffs a forum. Second, Plaintiffs sole remedy is not a claim under section 1983. There are state law tort remedies that can also be brought against the County for such violations. The barrier to Plaintiffs' claims is solely that they are brought pursuant to section 1983, and therefore the limitations on municipal liability are applicable.

Finally, Plaintiffs insist that a Rule 56(f) continuance is appropriate in these circumstances. *See* Plaintiffs' Motion at 12-13. Plaintiffs suggest that this court gave the County a "second bite at the apple" and that "[t]he Court should avoid the appearance of favoritism and provide Plaintiffs an opportunity to come up with additional evidence as the Court felt it needed." *Id.* at 13. First, as the court explained in its previous Order, "[t]he court . . . normally would not consider a second motion for summary judgment brought on the same issue as an earlier motion. In this instance, the court was required, by case law, to decide who has final policymaking authority at the County Prosecutor's Office." April 6, 1998 Order at 25. Therefore, the court allowed the second motion for

summary judgment by the County, not to give the County a "second bite at the apple," rather it was to correct an error made by the court. The determination of who has final policymaking authority for the County is not an issue that the jury decides. Instead it is a question of law determined by application of state law, and thus a question for the court.

Second, Plaintiffs failed to move for a Rule 56(f) continuance in its opposition to the County's Motion, nor did they do so at the hearing. A motion for reconsideration is not the appropriate time to bring such a request. A motion for reconsideration is brought based upon new evidence, a change in law, or manifest error. A party cannot bring a motion for reconsideration expecting to obtain a Rule 56(f) continuance so that he can later provide the court with the new evidence. The new evidence must be presented to the court at the time the motion is made, to allow otherwise would create a procedural nightmare. A Rule 56(f) continuance should be brought at the time the original motion for summary judgment is pending before the court. Plaintiffs' delinquency in bringing such a motion is not an issue the court can consider at this late date. Consequently, Plaintiffs' request for a Rule 56(f) continuance is DENIED.

CONCLUSION

For the reasons stated above, the court DENIES Plaintiffs' Motion for Reconsideration.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, JUL 23 1998

/s/ David Alan Ezra
DAVID ALAN EZRA
UNITED STATES
DISTRICT JUDGE

Roger Christie, et al. vs. G. Kay Iopa, et al., Civil No. 95-01026 DAE; ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION